

PROPOSED REGULATION OF THE NEVADA BOARD TO REVIEW CLAIMS

January 21, 2016

P2015-06

EXPLANATION – Matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: NRS 590.830

A permanent regulation relating to the Nevada Board to Review Claims revising the provisions governing the bid process, examination of records and the time required to provide payment and submit documentation regarding payment to contractors and vendors; and providing other matters properly relating thereto.

Section 1. NAC 590.710 is hereby amended to read as follows:

NAC 590.710 Interpretation of certain statutory terms. (NRS 590.830)

1. For the purposes of NRS 590.700 to 590.920, inclusive, the Board interprets:

(a) “Costs for cleaning up” to mean any expense of corrective action necessitated by a discharge from a storage tank. The term does not include:

- (1) The expense of any bond posted to release a writ of attachment;
- (2) Any expense incurred by an operator to investigate or defend any claim or suit, except any such expense incurred at the request of the Board;
- (3) Any expense taxed against the operator as costs of suit in a suit or administrative proceeding;
- (4) Any award of prejudgment interest, except for interest awarded on that part of the judgment paid by the Fund;
- (5) Any expense of repairing, replacing or upgrading any storage tank or its contents;
- (6) Any expense incurred by an operator during the transportation, loading or unloading of a portable storage tank; and
- (7) Any loss of income or revenue of the business of an operator that is incurred by an operator during a corrective action necessitated by a discharge.

(b) “Damages” to mean any money the operator of a storage tank becomes legally obligated to pay as damages because of bodily injury or property damage to any person other than the State or the operator caused by a discharge. The term does not include:

- (1) Any expense excluded from the definition contained in paragraph (a);
- (2) Any obligation of the operator imposed pursuant to any statute providing benefits for workers’ compensation, disability or unemployment compensation;

(3) Any bodily injury to an employee of the operator, or the spouse, parent, brother or sister of the employee, arising out of and in the course of the employee's employment by the operator. This exclusion applies whether the operator may be liable as an employer or in any other capacity, and to any obligation to share damages with or reimburse another person who must pay damages because of the injury;

(4) Any obligation of the operator imposed by a contractual assumption of liability; or

(5) Any expense incurred by an operator during the transportation, loading or unloading of a portable storage tank.

(c) "Emergency action" to mean any action that:

(1) Stops the release of petroleum;

(2) Identifies or mitigates existing or potential hazards from fire, explosion, vapor or other hazards associated with a release; or

(3) Prevents the migration of petroleum which poses a substantial imminent threat to the environment.

(d) "Marina storage tank" to mean a petroleum storage tank used to provide fuel to water vessels, at least 90 percent of which is either above ground level or in or over water and which has a capacity of at least 110 gallons but not more than 12,000 gallons. The term includes all piping connected to the tank, except piping, valves, hoses, filters and nozzles associated with the fuel dispenser.

(e) "Site" to mean the facility~~ies~~, *including all businesses that could reasonably be associated with the tank and unity of ownership of such businesses and tank*, whether situated on a single parcel or on multiple adjacent parcels, where the tank is located.

(f) "Small business" to mean a business which receives less than \$500,000 in gross annual receipts from the site where the tank is located, based upon the average annual gross receipts for the following period:

(1) If the business has been in operation for 5 or more fiscal years on the date on which the discharge is discovered, the 5 fiscal years immediately preceding the date on which the discharge was discovered; or

(2) If the business has been in operation for less than 5 fiscal years on the date the discharge is discovered, the total number of years the business has been in operation.

(g) "Storage tank" to mean any tank, including any connected pipes, except piping above the dispenser shear valve, used to contain an accumulation of petroleum. The term does not include any tank that is:

(1) Exempted from the provisions of NRS 590.700 to 590.920, inclusive, unless the operator of the tank chooses to register it pursuant to paragraph (b) of subsection 1 of NRS 590.920;

(2) Excluded from the definition of "underground storage tank" in 40 C.F.R. § 280.12, except that a farm or residential tank having a capacity of 1,100 gallons or less and that is used for storing motor fuel for noncommercial purposes is a storage tank;

(3) Permanently closed in accordance with NAC 459.9972 and 40 C.F.R. § 280.71; or

(4) Not federally regulated which is permanently closed in accordance with a rule or an ordinance of a local governmental entity.

2. As used in this section:

(a) “Bodily injury” means any injury, sickness, disease or death suffered by a person as a proximate result of a discharge.

(b) “Property damage” means any actual injury to real or tangible personal property, loss of use of the property, or both, occurring as a proximate result of a discharge.

(c) “Suit” means any civil proceeding in which damages are sought for which the Fund is potentially liable. The term includes any arbitration proceeding in which such damages are sought, to which the operator must submit or to which he submits with the consent of the Board.

Sec. 2. NAC 590.760 is hereby amended to read as follows:

NAC 590.760 Discharges: Duties of operators. (NRS 590.830, 590.870)

1. The operator of a storage tank shall report any discharge promptly in accordance with the requirements of NAC 445A.347 and 40 C.F.R. §§ 280.50 and 280.53.

2. As soon as possible after the discharge, the operator shall submit to the Division an application for coverage by the Fund for the discharge. The application for coverage must be submitted on the form prescribed by the Division and must include:

(a) A written description of how, when and where the discharge occurred;

(b) A description of any damage known to the operator to have been caused by the discharge; and

(c) If the services of a person certified as an environmental manager pursuant to NAC 459.972 or 459.9724 have been obtained, the name of that person.

3. The operator shall take all reasonable steps to protect the site of the discharge from further damage in accordance with the provisions of 40 C.F.R. §§ 280.61 and 280.62.

4. The operator shall:

(a) Prepare and maintain a record of all costs incurred by him or her in cleaning up the discharge.

(b) Permit the Division to inspect any property or records relating to the discharge or damage caused by the discharge.

(c) Notify the Division if the cost of:

(1) An emergency action; or

(2) The initial response actions and abatement measures prescribed by 40 C.F.R. §§ 280.61 and 280.62,

➡ will exceed \$5,000.

(d) If the operator is seeking reimbursement by the Fund for the costs of cleaning up the tank or of liability for damages, unless an employee of the operator will be providing services that are exempted from the provisions of NAC 459.970 to 459.9729, inclusive, by subsection 1 of NAC

459.9718, obtain the services of a person who is certified as an environmental manager pursuant to NAC 459.972 or 459.9724.

(e) Obtain approval from the Division or secure not less than three competitive bids for a task included in a corrective action that costs more than ~~[\$3,000]~~ *the specified value in the Certified Environmental Manager Cost Guidelines, Attachment A of amended Policy Resolution 2001-05, which may be adjusted based on the inflation rate, to the nearest \$1,000, of the original \$3,000 value established in 1989* if:

(1) The corrective action necessitated by a discharge from a storage tank is not an emergency pursuant to paragraph (c) of subsection 1 of NAC 590.710; and

(2) The operator is seeking reimbursement by the Fund for the costs of cleaning up the tank or of liability for damages.

Sec. 3. NAC 590.774 is hereby amended to read as follows:

NAC 590.774 Factors considered in determining necessity for cleanup of discharge from certain storage tanks. (NRS 590.830) In determining whether cleaning up a discharge from a storage tank ~~[-] which has a capacity of 1,100 gallons or less and which is used to store heating oil for consumption on the same premises where the oil is stored:~~

1. The Division may consider the factors listed in NAC 445.227.

~~[- 1. Which has a capacity of 1,100 gallons or less; and~~

~~— 2. Which is used to store heating oil for consumption on the same premises where the oil is stored, — is necessary to protect the environment or the public health and safety, the Division may consider the factors listed in subsection 1 of NAC 459.9973.]~~

Sec. 4. NAC 590.780 is hereby amended to read as follows:

NAC 590.780 Form of claim for reimbursement; time limitations for filing claims for reimbursement; payment to operator, vendor or contractor; payment required of operator; payment of per diem allowance and travel expenses. (NRS 590.830)

1. An operator, vendor or contractor who seeks to be reimbursed by the Fund for costs or liability for damages resulting from a discharge must submit to the Division a verified claim for reimbursement in the form prescribed by the Board along with any supporting documents required to substantiate his or her eligibility for reimbursement. An initial claim must be submitted within 12 months after the date on which the operator, vendor or contractor knew or should have known of the discharge and the final claim must be submitted within 12 months after the completion of the corrective action necessitated by the discharge. The Board will not accept a claim after either deadline unless the operator, vendor or contractor demonstrates good cause for the failure to comply with the deadline.

2. The operator shall provide any additional information required by the Board in order to determine his or her eligibility for payment from the Fund.
3. The Board may authorize payment from the Fund to:
 - (a) An operator;
 - (b) A vendor;
 - (c) A contractor; or
 - (d) Any combination of persons listed in paragraph (a), (b) or (c), jointly.
4. If money from the Fund is paid to an operator before the operator pays a vendor or contractor, or both, the operator shall:
 - (a) Pay the vendor or contractor, or both; and
 - (b) Not more than ~~[30]~~ 60 days after receiving the money from the Fund, provide the Division with confirmation of payment to the vendor or contractor, or both, of the money paid by the Board. *If confirmation of payment is not received in 60 days, subsequent claims shall not be approved and paid by the Board until the second Board meeting following confirmation of payment.*
5. If an operator fails to pay a vendor or contractor for costs approved and paid by the Board within 30 days, the operator shall reimburse the Board for the money paid by the Board *and:*
 - (a) *Subsequent claims shall not be approved and paid by the Board until the operator reimburses the Board for the money paid by the Board.*
 - (b) *Upon reimbursement of the money paid by the Board, subsequent claims, including the claim associated with the reimbursed money, may be presented to the Board for approval and payment.*
6. If an operator is entitled to receive payment for his or her necessary expenses for the costs of cleaning up, the Board will authorize payment of the per diem allowance and travel expenses at the same rate provided for state officers and employees generally.
7. As used in this section, “claim” or “claim for reimbursement” means a request for reimbursement by the Fund of a sum of money, accompanied by the required supporting documents. The term does not include an application for coverage under the Fund.